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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD KADREY, et al.,

Individual and Representative Plaintiffs,

V.

META PLATFORMS, INC., a Delaware corporation;

Defendant.

Case No. 3:23-cv-03417-VC

**DEFENDANT META PLATFORMS, INC.'S
RESPONSE TO PLAINTIFFS' MOTION FOR
RELIEF FROM NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE (DKT. 125)**

Discovery Cut-Off: September 30, 2024
Date Action Filed: July 7, 2023

1 Pursuant to this Court’s September 27, 2024 Order (Dkt. 181), Defendant Meta Platforms,
 2 Inc. (“Meta”) respectfully opposes Plaintiffs’ Motion for Relief from Nondispositive Pretrial Order
 3 of Magistrate Judge (“Motion”) (Dkt. 125). Plaintiffs’ Motion disregards the relevant standard of
 4 review, the applicable law, and the record evidence. Because Magistrate Judge Hixson’s August
 5 22, 2024 Discovery Order (“Discovery Order”) (Dkt. 114) is neither clearly erroneous nor contrary
 6 to law, Plaintiffs’ Motion should be denied.

7 **Background.** Former part-time Meta employee and AI researcher Tim Dettmers shared
 8 Meta’s privileged legal advice on EleutherAI’s server on Discord (the “Subject Communications”)
 9 in a few messages posted in late 2020 and early 2021. Dkt. 105 at 2–3.¹ As Judge Hixson
 10 concluded—and as Plaintiffs no longer dispute—the Subject Communications “plainly reveal
 11 privileged legal advice given to [Mr. Dettmers] by Meta’s attorneys” and were therefore “privileged
 12 in the first place.” Dkt. 114 at 1. It is also undisputed that Mr. Dettmers posted the Subject
 13 Communications without Meta’s knowledge or authorization, and that Meta first learned about the
 14 Subject Communications when they were quoted in Plaintiffs’ First Consolidated Amended
 15 Complaint filed on the public docket in this case in December 2023 (“FCAC”) (Dkt. 64). *See* Dkt.
 16 105-1 (“Dettmers Decl.”), ¶ 12; Dkt. 105-2 (“Zettlemoyer Decl.”), ¶ 6–7. By that time, the Subject
 17 Communications had been removed from Discord for several months. Dkt. 69, ¶ 64.

18 At the time he made the Subject Communications, Mr. Dettmers was a Ph.D student and a
 19 part-time Visiting Researcher in the Facebook AI Research (FAIR) team at Meta. Dettmers Decl.,
 20 ¶ 3. Mr. Dettmers obtained his research position at Meta through a joint program between the
 21 University of Washington and Meta whereby students could work part-time for Meta for up to two
 22 years. Dettmers Decl., ¶¶ 2–3. Mr. Dettmers’ work at Meta included researching how to make AI
 23 large-language models (“LLMs”) more efficient, and none of his research or work related to the
 24 Llama LLM. *Id.* ¶ 5. He did not have any managerial responsibilities, nor was he tasked with
 25

26 ¹ EleutherAI is a non-profit research lab. *See* Dkt. 105 at 2. Discord is a real-time messaging
 27 service that, unlike other social media platforms, is comprised of decentralized servers—the vast
 28 majority of which are invite-only spaces for small communities—in which users communicate. *See*
id. at 1–2. Discord is not designed to maximize engagement; older conversations are not readily
 accessible on the platform; and the EleutherAI Discord server does not appear to have been indexed
 by or searchable through internet search engines like Google. *See* *id.* at 2.

1 communicating with third parties regarding legal issues. Zettlemoyer Decl., ¶ 3.

2 Meta's legal advice in the Subject Communications regarded the use of certain datasets for
 3 AI research and was requested by other members of Mr. Dettmers' research team through an
 4 internal "single review tool" (SRT). *Id.* at ¶ 4–5; Dettmers Decl., ¶ 7. Among these datasets was
 5 The Pile, which was released by EleutherAI in late-2020, around the time of the Subject
 6 Communications. Dettmers Decl., ¶¶ 6, 8–11. Mr. Dettmers, of his own accord and without Meta's
 7 authorization, shared the legal advice that he received from Meta's attorneys while communicating
 8 with two individuals at EleutherAI following the release of The Pile. *Id.* at ¶ 8, 12.

9 **Legal Standard.** Plaintiffs ignore the controlling legal standard. Under Rule 72(a), a
 10 magistrate judge's discovery order may only be modified or set aside if it is "clearly erroneous" or
 11 "contrary to law." Fed. R. Civ. P. 72(a). "The magistrate's factual determinations are reviewed for
 12 clear error, and the magistrate's legal conclusions are reviewed to determine whether they are
 13 contrary to law." *Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010). "This standard
 14 is highly deferential—the district judge may not simply substitute his or her judgment for that of
 15 the magistrate judge." *Campbell v. City of Milpitas*, WL 5077135, at *1 (N.D. Cal. Oct. 9, 2014)
 16 (citing *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991)).²

17 **Judge Hixson Did Not Clearly Err In Finding That Mr. Dettmers Lacked Authority
 18 to Waive Meta's Privilege.** "[T]he power to waive the corporate attorney-client privilege rests
 19 with the corporation's management and is normally exercised by its officers and directors." *United
 20 States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (quoting *Commodity Futures Trading Comm'n
 21 v. Weintraub*, 471 U.S. 343, 348 (1985)). Thus, public disclosure of a corporation's attorney-client
 22 privileged material does not constitute a waiver of privilege where, as here, the disclosure was not
 23 authorized by the corporation. *See Chen*, 99 F.3d at 1502 (explaining that where a corporate
 24 employee "never was given any authority to waive the attorney-client privilege," the employee's
 25 "disclosures of attorney-client communications could not and did not waive the privilege"). This

26 ² Local Rule 72-2(d) provides that "[i]f no order denying the motion or setting a briefing schedule
 27 is made within 14 days of filing the motion [for relief], the motion shall be deemed
 28 denied." Plaintiff's Motion was filed on September 5, 2024, and no order denying the motion or
 setting a briefing schedule was made by September 19, 2024.

1 is so even if the privileged material is made available widely. *See, e.g. Dukes v. Wal-Mart Stores, Inc.*, 2013 WL 1282892 (N.D. Cal. March 26, 2013) (holding that publication by the *New York Times* of the details of an unauthorized disclosure of corporate attorney-client privileged information did not waive the attorney-client privilege).

5 It is undisputed that Mr. Dettmers, a part-time employee and Ph.D student, was not part of
 6 Meta management and thus not authorized by the nature of his position to waive Meta's privilege.
 7 In rare circumstances, lower-level employees can waive a corporation's privilege by inadvertently
 8 disclosing privileged material while acting within the scope of their authority. For example, in
 9 *Vans, Inc. v. Walmart, Inc.*, 2023 WL 4291986, *6 (C.D. Cal. Jun. 5, 2023), the court concluded
 10 that Walmart's privilege was waived by a lower-level employee who was "delegated authority to
 11 work with a supplier to implement legal advice." *Id.* at *8 (cleaned up). The record here is
 12 uncontradicted that Mr. Dettmers was not delegated authority by Meta to discuss legal matters with
 13 third parties. As Judge Hixson correctly noted, it was Mr. Dettmers, of his own accord, who
 14 "sought to communicate (and potentially collaborate) with EleutherAI." Dkt. 114 at 3:25–28; *see also*
 15 Dettmers Decl., ¶ 8. Mr. Dettmers' supervisor Luke Zettlemoyer also confirmed that Mr.
 16 Dettmers—unlike the employee in *Vans*—was not tasked with communicating with third parties
 17 regarding legal issues, Zettlemoyer Decl., ¶ 3. There is no error—let alone clear error—in Judge
 18 Hixson's determination that Mr. Dettmers lacked authority to waive Meta's privilege.³

19 **Judge Hixson Did Not Clearly Err In Finding That Meta Took Reasonable Steps To
 20 Protect Its Privilege.** "[W]hen there has been an involuntary disclosure, the privilege will be
 21 preserved if the privilege holder has made efforts reasonably designed to protect the privilege."
 22 *Gomez v. Vernon*, 255 F.3d 1118, 1131–32 (9th Cir. 2001). The law does not require "strenuous
 23 or Herculean efforts," only "reasonable efforts." *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2008
 24 WL 350641 *1–2 (N.D. Cal., Feb. 2, 2008).⁴

25 ³ Plaintiffs incorrectly argue that Judge Hixson applied the wrong legal standard by not considering
 26 whether Mr. Dettmers' disclosure was voluntary. Dkt. 125 at 3–4. But voluntariness is not the
 27 issue; the issue here is whether Mr. Dettmers had the **authority** to disclose the privileged
 28 information, as required for even a voluntary privilege waiver. *See, e.g., Chen*, 99 F.3d at 1502.

⁴ Plaintiffs argue (Dkt. 125 at 4) that Judge Hixson should have applied the test in *Hartford Fire
 Ins. Co. v. Garvey*, which considers three additional elements beyond Meta's reasonable efforts to
 protect its privilege. 109 F.R.D. 323, 332 (N.D. Cal. 1985). However, that case predates the Ninth

1 Judge Hixson concluded, correctly, and in no event with clear error, that Meta “took all
 2 reasonable steps to protect the privilege.” Dkt. 114 at 4. It is undisputed that Meta did not know
 3 that Mr. Dettmers was sharing legal advice with third parties until Plaintiffs filed the FCAC on
 4 December 11, 2023. Dettmers Decl., ¶ 12; Zettlemoyer Decl., ¶ 6. Meta promptly had the
 5 document “locked” in the ECF system, rendering it publicly inaccessible. Dkt. 64. Additionally,
 6 Meta employees, including Mr. Dettmers, were trained not to disclose legal advice or other
 7 confidential information externally. Zettlemoyer Decl., ¶ 3; Dettmers Decl., ¶ 12. And Meta had
 8 safeguards in place to limit access to the SRT tool—through which Mr. Dettmers and his colleagues
 9 received the legal advice in question—to only those employees that were added to a particular SRT
 10 request. Zettlemoyer Decl., ¶ 5. As such, only the researchers in Mr. Dettmers’ team, the Meta
 11 attorneys that provided the legal advice, and two administrative employees responsible for
 12 managing SRT requests were provided access to the specific legal advice at issue. *Id.*

13 Plaintiffs’ claim that Meta should have found and removed the Subject Communications
 14 from Discord before it knew about them is baseless, and in no case indicates clear error on the part
 15 of Judge Hixson. Meta had no reason to investigate Discord for potential disclosure of its privileged
 16 information, particularly given the obscure nature of EleutherAI’s Discord server. Zettlemoyer
 17 Decl., ¶ 6; Dettmers Decl., ¶ 8. And Plaintiffs’ claim that the Subject Communications were on
 18 EleutherAI’s Discord server for two years “where anyone could see them,” Dkt. 125 at 4, is contrary
 19 to the record. The EleutherAI Discord server and channels were never indexed by or searchable
 20 through internet search engines, and users had to accept an invitation and log in to access the server.
 21 Dkt. 105 at 2. Moreover, as a “real time messaging service,” older Discord messages would not be
 22 readily accessible to a user visiting the server months or years after the fact. *Id.*

23 Plaintiffs also point to a LinkedIn post with screenshots of the Subject Communications to
 24 argue that Meta did not take reasonable steps to protect its privilege. Dkt. 125 at 4. However, they
 25 fail to disclose that the post was made by the same individual who provided the Subject

26 Circuit’s decision in *Gomez* and also is about the inadvertent production of documents in the course
 27 of litigation, not—as here—whether an involuntary disclosure of privileged material to a third party
 28 results in a privilege waiver. Moreover, waiver is still unwarranted even if *Hartford* applied here.
 Not only did Meta act reasonably and promptly, but the legal advice reflected in the documents at
 issue is not about the Llama LLMs, on which Mr. Dettmers did not work. *See supra* p.1.

1 Communications to Plaintiffs in the first place, Dkt. 145-3—an individual over whose
 2 communications Plaintiffs' counsel sought to assert work product protection, *see* Dkt. 105 at 7,
 3 who has a demonstrated hostility toward Meta and other generative AI companies, *see* Hartnett
 4 Decl., Exs. 6, 7. Meta detailed to Judge Hixson the efforts it took to have LinkedIn remove the
 5 individual's post, Dkt. 105 at 7, and it has renewed these efforts after Judge Hixson's order, *see*
 6 Supp. Decl., ¶¶ 3–4. Given the LinkedIn poster's hostility and extraterritoriality, any direct request
 7 would have been futile. *See* Dkt. 105 at 7; Supp. Decl., Ex. A (Hearing Transcript) ("Well,
 8 presumably, he is not going to be very helpful, because he intentionally posted it").

9 Plaintiffs are also wrong that the online publication of attorney-client privileged material
 10 vitiates the privilege, *see* Dkt. 125 at 5. This erroneous argument ignores, among other things,
 11 *Dukes*, which involved a privileged memorandum leaked to and published by the *New York Times*.
 12 2013 WL 1282892 at *1. As Judge Corley concluded, Wal-Mart's privilege was not waived
 13 because the disclosure was "unauthorized and involuntary," and Wal-Mart took reasonable
 14 precautions to limit dissemination of the privileged memo. *Id.* at *5–6. Likewise here.

15 Plaintiffs cite no cases finding privilege waiver where publication was involuntary. *See*
 16 Dkt. 125 at 5. In *Estate of Bennet v. Altec Indus., Inc.*, the disclosure of defendant's information
 17 on Lexis CourtLink was because the defendant "previously produced the drawings in the course of
 18 discovery in two other lawsuits." 2005 WL 8155489, *1 (D. Wy. Dec. 16, 2005). In *Younes v. 7-*
 19 *Eleven, Inc.*, the court found that 7-Eleven did not even demonstrate that the purportedly privileged
 20 document that was disseminated online was privileged. 2014 WL 1959246, * 3 (D.N.J. May 15,
 21 2014). And *L.P. v. Lupin Ltd.* did not involve an assertion of privilege. 2014 WL. 956086, *3
 22 (D.N.J. Mar. 12, 2014). In short, these cases do not support Plaintiffs' claim of waiver or show
 23 that Judge Hixson's determination of non-waiver was clearly erroneous.

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25 When Plaintiffs came into possession of Meta's attorney-client privileged information from
 26 an individual hostile to Meta obtained from an obscure Discord server, they should have contacted
 27 Meta—not disclosed the materially publicly in the FCAC. There has been no waiver over the
 28 concededly privileged material at issue. The Court should deny Plaintiffs' Motion.

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2 Dated: October 4, 2024

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